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Supreme Court, U.S.
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No. 00-1227

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

GREENSPRING RACQUET CLUB, INC., *et al*,

Petitioners,

v.

BALTIMORE COUNTY, MARYLAND, *et al*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

VIRGINIA BARNHART
County Attorney
LAW OFFICES OF BALTIMORE COUNTY
Old Courthouse, 2nd Floor
400 Washington Avenue
Towson, Maryland 21204
(410) 887-4420

Counsel for Respondent

Wright Appellate Services 0216
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

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OPINIONS BELOW

Petitioners' statement regarding the opinions issued below is incomplete. The citation for the unreported Fourth Circuit case is 232 F.3d 887 (4th Cir. 2000). As to the district court proceedings, petitioners failed to mention that the district court issued another opinion, finding that Petitioners' lawsuit was frivolous and awarding Respondent attorneys' fees pursuant to 42 U.S.C. § 1988(b). *See Greenspring Racquet Club, Inc., v. Baltimore County*, 77 F.Supp. 2d 699 (D. Md. 1999). The Fourth Circuit affirmed the district court's holding on frivolity ("amply supported by the record"). *See* App. 21.

MISSTATEMENT OF FACTS

Pursuant to Rule 15.2, Respondents are required to address misstatements of fact contained in the Petition. There are ten worth mentioning.

1. "Petitioners ... have battled Baltimore County, Maryland for several years for the right to redevelop a 5.5 acre parcel of land...." *See* Petition at 2. This statement is quite false but it represents Petitioners' attempt to make this case a first cousin to *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999).[1] On June 10, 1998, Petitioners began their effort to redevelop the property. App. 94. On October 5, 1998, the County passed the legislation which is the subject of this suit. App. 80. Baltimore County submits that four months is not "several years."

2. In the very same sentence as their first misstatement, Petitioners label the area at issue as a "major commercial office center." *See* Petitioner at 2. In the area of regulatory takings jurisprudence, context is important. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct 2646, 2659, 57 L.Ed 631 (1978). The property at issue is surrounded by residential and agricultural properties.

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[1]But *Del Monte* attracted this Court's attention because over the course of 5 years the City of Monterey erected various barriers to development, only to be satisfied by the developer who then faced newly-erected conditions, all plausibly designed to thwart the developer. 526 U.S. at 706.

3. Petitioners also contend that the subject bill was "designed to single out Greenspring's property." *See* Petition at 2-3. Yet, the record reflects that the bill applies to over 150 other properties. App. at 30 n.3.

4. Petitioners further assert that the "district court found and the Fourth Circuit affirmed that, as a matter of law, this restrictive ordinance although enacted in bad faith retaliation to Greenspring's redevelopment initiative, substantially advanced a legitimate state interest...". *See* Petition at 3. Neither the district court nor the Fourth Circuit ever found that Bill 111-98 was "enacted in bad faith retaliation". In fact, both explicitly rejected such an idea. App. 16 & 42.

5. Petitioners next assert that "[i]n 1998 Greenspring undertook...[a] 'Business Major' ('BM') zoning classification which permits, as a matter of right, office buildings as high as 100 feet...". *See* Petition at 3. As recognized by the lower courts, a vested right to build under Maryland law does not exist until a property owner has a building permit in hand and has started construction -- colloquially known as the "shovel-in-the-ground" rule. *Colwell v. Howard County,* 31 Md. App. 8, 15, 354 A.2d 210 (1976).

6. Petitioners also incorrectly contend that "[a]lthough Greenspring demonstrated compliance with all the requirements for this exemption, the request was denied." *See* Petition at 4.[2] Petitioners' statement is incorrect for it implies

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[2]The exemption referred to here is found in the Baltimore County Code §26-171(b)(9). The exemption obviates the need for the de-

that if they met certain conditions, then they would get the exemption. Yet again they have no such "right." *City of Annapolis v. Waterman*, 357 Md. 484, 532 n.4 (2000) ("if planning boards had no alternative but to rubber-stamp their approval on every subdivision plat which conformed with the zoning ordinance, there would be little or no reason for their existence").

7. Petitioners further contend that "[t]he ordinance destroyed Greenspring's office development capacity...." *See* Petition at 4. But, under the challenged law, Petitioners could still have built an office building 35 feet high.

8. Petitioners also assert that "[t]he impact of the ordinance on Greenspring's property was to reduce the property's use and value by 95.6%." *See* Petition at 4 fn.1. This statement is premised on the notion that before enactment of Bill 111-98, petitioners had a right to build a 100 foot high building. Under Maryland law, they had no right, only a unilateral expectation. *City of Annapolis v. Waterman*, 357

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veloper to go through a community input meeting, the process of which is described in Baltimore County Code §26-202(h), and a hearing officer's hearing (meaning the Baltimore County Zoning Commissioner §26-168(w)). The "virtue" of the exemption is that it keeps the public citizenry, who might be affected by the development, completely sequestered from the process. The developer may obtain the exemption if the Director of Permits and Development Management deems the development a "minor development" as defined in §26-168(cc). This is a discretionary call under §26-239(b).

Md. 484, 745 A.2d 1000 (2000) ("In Maryland, it is established that in order to obtain a 'vested right' in the zoning ordinance prohibiting or limiting that use, the owner must" have a permit in hand and have begun construction).

9. The entire and only full paragraph on page 5 of the Petition is also irrelevant. It has nothing to do with whether the Bill is unconstitutional, which was the aim in all seven counts of Petitioners' operative complaint.

10. Finally, Petitioners contend that "...Greenspring was denied the opportunity to litigate its federal causes of action." *See* Petition at 11. Petitioners *did* litigate their federal causes of action and, despite all principles of *res judicata*, are litigating them all over against the same defendant in state court, this time under the analogous provisions of the Maryland Declaration of Rights.

REASONS FOR DENYING THE WRIT

I. This Is Not The Case To Review The Meaning Of The Phrase "Substantially Advance Legitimate State Interests"

Petitioners' arguments focus on the first prong of evaluating regulatory takings declared in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Under that test, a general zoning law can violate the Fifth Amendment if it "does not substantially advance legitimate state interests." *Id.* This case involves a zoning law that sets height restrictions – restrictions that have been upheld for nearly a century as advancing legi-

timate governmental interests. Of all the important issues competing for this Court's time, this case is ill-suited for inclusion on its docket. There are three reasons.

First, this case involves the legislative passage of a county-wide zoning regulation. This Court has been deferential to such laws for many years. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit"); *Hodel v. Irving*, 481 U.S. 704, 713 (1987) ("Government has considerable latitude in regulating property rights in ways that may adversely affect the owners.").

Second, the Baltimore County legislation was an attempt, in the words of the Fourth Circuit, at "controlling dense development in areas located near rural conservation zones." App. 13. Whatever the existing debate is in some still remote quarters of takings litigation about what constitutes a legitimate state interest, the aim (or the ends) of this very type of regulation is no longer in dispute. This Court has deemed such purposes to be a legitimate municipal goal. *See e.g.*, *Berman v. Parker*, 348 U.S. 26, 33 (1954) (observing, in a zoning context, that it is "within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled"). Petitioners' stupid staff argument, *see* Petition at 17, is unavailing as governments are allowed to identify their objectives for passing a bill. *City of*

New Orleans v. Dukes, 427 U.S. 297, 304 (1976). Usually, it is obvious. *Id.* If this Court issues the writ it should be prepared to overrule cases like *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), where this Court relied on statements of legislators who sponsored the bill in upholding it. *Id.* at 465, 467-68.

Third, whatever the existing debate about what "substantially advances" means, Baltimore County's belief that regulating by height would deter potentially deleterious effects on traffic, road, sewers and water use satisfies the means to the end. Lower buildings means fewer people, which means fewer cars, less water use and less traffic. Thus, the "means" can be satisfied by judicial notice. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1986); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995). *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62 (1973) ("The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional"); *Id.* at 63 ("Mr. Justice Cardoza said that all laws in Western civilization are 'guided by a robust common sense'").

It is for these reasons that granting the writ in this case would be senseless.[3] The Court would be addressing an issue that has been settled for decades. *Pennell v. City of San*

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[3]If the Court believes the meaning of the substantially advance test requires clarification, the case of *Cayetano v. Chevron USA, Inc.*, No. 00-1198, is a far better vehicle than this one.

Jose, 485 U.S. 5, 20 (1988) (Scalia, J., dissenting) ("Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy .... Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion."); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 418 (1922) (Brandies, J., dissenting) ("Every restriction upon the height of building might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the state need not resort to that power.").[4]

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[4]Most of Petitioners' argument on this issue attacks the breadth of the Fourth Circuit's holding. *See* Petition at 21. They also attach great significance to the scope of that court's holding on their *Agins* issue. *Id.* at 8 & 16. The Court can safely ignore this basis for issuing the writ because its office is to review judgments not words in opinions. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 51 n.9 (1996).

II. Petitioner's Equal Protection Claim and *Village Willowbrook v. Olech* Are as Different as January and June.

Petitioners urge the Court to issue the writ to correct the Fourth Circuit's misapplication of this Court's recent decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). According to them, "[t]he Court should take this opportunity to define and clarify the ramifications of the *Olech* decision....". *See* Petition at 22. The notion that this case is a good opportunity to explore *Olech* is unfounded.

First, the decision-maker for the government in *Olech* was an unelected official from the executive branch. This case involves a duly-elected county council, a legislative body. This distinction is crucial. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) ("criteria to identify what is totally arbitrary *differ depending* on whether it is legislation or a specific act of a government officer that is at issue") (emphasis added).

Second, the *Olech* Court authorized a "class of one" in equal protection litigation. But, the Court did not reach the lower court's theory of subjective ill will that Petitioners now wish to "define and clarify." 528 U.S. at 565.

Third, Petitioners fail *Olech's* most basic hurdle. The regulation limiting height has a rational basis. Baltimore County has already explained why: *viz.*, limiting the size of buildings limits the number of its occupants which limits the number of cars and the amount of water consumed. The

Court has found that regulations of this type command assent that they are legitimate governmental objectives. *Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Euclid v. Ambler Realty*, 272 U.S. 365 (1926). Moreover, the law here does not involve a fundamental right or a suspect class. Therefore the regulation is presumed constitutional. This Court has long recognized that governments are given wide latitude -- their distinctions need not have "mathematical exactitude" – and they can take "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). If the question is debatable, the legislation is valid even if plaintiffs can show the legislature was mistaken. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Unless these principles are now viewed by this Court as suspect, Petitioner's equal protection claim is empty. This Court often has held that if litigants are disenchanted with certain laws, then they should repair to the legislature to seek a change in the law and not run into court. *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

III. In Issuing A Writ, This Court Should At Least Require Petitioner To Be Injured By The "*Williamson* Trap"

Petitioners' plea that this Court review the alleged confusion purportedly engendered by the *Williamson County* case is unfounded. Land use plaintiffs trapped by *Williamson County* invariably contend that they sustained some type of injury. Typically, it is claimed that a plaintiff's attempt to

satisfy the ripeness requirement under *Williamson County* (by bringing an inverse condemnation claim in state court) subsequently deprives them of their ability to litigate their federal claims in federal court based on principles of *res judicata*. Whether this is actually occurring in the federal courts is an academic point in the context of this case.

Petitioners sued in federal court and, unlike litigants trapped by *Williamson*, *had their claims adjudicated in federal court*. They even had their as-applied takings claim adjudicated. The Fourth Circuit reversed the district court on this claim alone, requiring it to adjudicate the as-applied takings claim after Petitioners exhaust in state court.[5]

The *Williamson* trap aggrieves some developers because they never get their claims adjudicated in federal court. In this case, however, the Petitioners did. Indeed, it was the district court's *disposition* of their federal claims that troubled Petitioners, not that their federal claims had not been heard because they were. As such, they obviously were never caught in this purported trap.

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5 In doing so, the court rejected respondent's argument that exhaustion was futile.

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CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

VIRGINIA BARNHART
County Attorney

Law Offices of Baltimore County
Old Courthouse, 2nd Floor
400 Washington Avenue
Towson, MD 21204
410-887-4420